Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

HOSEP KRIKOR BAJAKAJIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED

Whether 18 U.S.C. 982(a)(1) is per se unconstitutional under the Excessive Fines Clause of the Eighth Amendment insofar as it subjects to criminal forfeiture currency that is about to be transported out of the United States without the filing of a required report.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 84 F.3d 334.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. A petition for rehearing was denied on November 18, 1996. Pet. App. 15a. On February 7,

1997, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 5316 of Title 31, United States Code, provides in relevant part:

> (a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—
>
> (1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—
>
> (A) from a place in the United States to or through a place outside the United States;
>
> * * * * *
>
> (b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. * * *
>
> * * * * *

Section 5322(a) of Title 31, United States Code, provides:

> (a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324) shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

Section 982(a)(1) of Title 18, United States Code, provides in part:

> The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. * * *

STATEMENT

On his plea of guilty in the United States District Court for the Central District of California, respondent was convicted on one count of willfully failing to report the transportation of $357,144 out of the United States, in violation of 31 U.S.C. 5316(a) and 5322(a). The district court held that, although 18 U.S.C. 982(a)(1) required the court to order respondent to forfeit the unreported currency to the United States, the imposition of a forfeiture greater than $15,000 would violate the Excessive Fines Clause of the Eighth Amendment. The court thus ordered a forfeiture in the latter amount. Pet. App. 16a-19a. The court of appeals affirmed, holding that the forfeiture of any of the unreported currency as a sanc-

tion for a reporting violation is unconstitutional. *Id.* at 1a-14a.

1. On June 9, 1994, respondent Hosep Bajakajian was in Los Angeles International Airport, waiting to board a flight to Syria, when U.S. Customs inspectors discovered approximately $140,000 concealed in respondent's checked luggage and another $90,000 in a false bottom of one of his bags. An inspector stopped respondent and his family in the airport and informed them that they were required to report all money in their possession and in their luggage that exceeded $10,000. Respondent told the inspector that he had $8,000 and that his wife had $7,000. App., *infra*, 2a-3a; Plea Agreement 7 (Oct. 27, 1994).

Customs inspectors eventually discovered $357,144 concealed by respondent and his wife. After respondent was advised of his rights, he admitted to Customs agents that he knowingly and willfully failed to report the cash. App., *infra*, 3a.

2. On July 8, 1994, respondent was indicted in the United States District Court for the Central District of California. He was charged with one count of willfully failing to report the export of currency in excess of $10,000, in violation of 31 U.S.C. 5316(a)(1)(A) and 5322(a); one count of making a false material statement to the United States Customs Service, in violation of 18 U.S.C. 1001; and one count of criminal forfeiture of the undeclared funds under 18 U.S.C. 982(a)(1). App., *infra*, 3a.

On October 27, 1994, respondent pleaded guilty to the failure-to-report count and agreed to a bench trial on the forfeiture count. The government agreed to dismiss the false statement count at sentencing. App., *infra*, 3a.

At the bench trial on the forfeiture count, the parties proffered evidence that respondent had given three different explanations about the source of the funds he had concealed. Respondent first told Customs agents that a friend named Abe Ajemian had lent him approximately $200,000, that approximately $28,000 was his own, and that various friends and relatives had lent him the remaining $130,000. Gov't Trial Mem. 5 (filed Nov. 28, 1994). Ajemian told Customs agents, however, that he had not lent respondent $200,000. *Id.* at 5-6. Respondent then claimed that Saeed Faroutan lent him $170,000. *Id.* at 6. Faroutan, however, told Customs agents that he had made no such loan and that respondent had asked him to lie about it. *Ibid.* Respondent finally claimed that Ajemian and six others had provided $185,000 and that the rest belonged to him. Def. Trial Mem. 2-3 (filed Dec. 15, 1994). Respondent also claimed that he owed money to his cousin and that he had intended to travel to Cyprus to deliver the money to his cousin. *Id.* at 3.

Following the bench trial, the district court found that the entire $357,144 discovered by Customs agents was involved in respondent's offense, and that those funds were therefore subject to forfeiture under 18 U.S.C. 982(a)(1). App., *infra*, 16a. At sentencing, however, the court ordered respondent to forfeit only $15,000, ruling that forfeiture of more than that amount would be "grossly disproportionate" to respondent's culpability and therefore unconstitutional under the Excessive Fines Clause of the Eighth Amendment. *Id.* at 17a-18a. The court stated:

> I do believe that the United States currency was in the suitcase and in the carry-on luggage for reasons that were not illegal. I do believe that,

> even though it's a somewhat suspicious and confused story, documented in the poorest way, and replete with past misrepresentation, that the funds were * * * borrowed funds.
>
> * * * * *
>
> And I think the evidence has developed that [respondent's] state of mind * * * grew out of * * * distrust for the Government. * * * So, the amount of forfeiture will be modest, and will be very very minor, because in truth, and, in fact, I think none should be forfeited.

Ibid. The court also sentenced respondent to three years' probation and fined him $5,000. *Id.* at 18a-19a.

3. The court of appeals affirmed. App., *infra*, 1a-14a. The court applied a two-part test under which a forfeiture is constitutional under the Excessive Fines Clause only if "(1) the property forfeited is an 'instrumentality' of the crime committed; and (2) the value of the property is proportional to the culpability of the owner." *Id.* at 5a. The court held that the money concealed by respondent failed to satisfy the instrumentality component of that test. The court reasoned that money involved in a violation of Section 5316 can never be an instrumentality of that offense, because "[t]he crime is the withholding of information * * * not the possession or the transportation of the money." *Id.* at 6a.

The court concluded that its holding did not conflict with this Court's decision in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam), which, in rejecting a double jeopardy claim, upheld as remedial the civil forfeiture of gems that had not been declared when the owner entered the

country. App., *infra*, 7a-8a. The "key difference," the panel stated, "is that a violation of § 5316 merely deprives the government of information, whereas the smuggling of goods across the border deprives the government of revenue." *Id.* at 8a.

Having concluded that only an instrumentality of an offense is subject to forfeiture under the Excessive Fines Clause, and that money involved in a violation of Section 5316 is not an instrumentality of that offense, the court held that "[f]orfeiture of any amount" of respondent's undeclared money "would be unconstitutionally excessive under * * * [the] Excessive Fines Clause." App., *infra*, 9a. The court affirmed the judgment of the district court ordering the forfeiture of $15,000 only because respondent failed to cross appeal and therefore could not challenge the district court's judgment. *Id.* at 9a-10a.

Judge Wallace concurred in the judgment of affirmance, but sharply disagreed with the majority's Eighth Amendment analysis. App., *infra*, 10a-14a. Judge Wallace concluded that money involved in a violation of Section 5316 is an instrumentality of that offense, because "without the currency, there can be no offense." *Id.* at 13a. In ruling otherwise, Judge Wallace emphasized, "the majority strikes down a portion of 18 U.S.C. § 982(a)(1), thereby unduly limiting the government's forfeiture powers." *Id.* at 10a. Judge Wallace nonetheless voted to affirm the district court's judgment, because he concluded that the district court did not commit clear error in finding that a $15,000 forfeiture was proportional to respondent's culpability. *Id.* at 13a-14a.

The government's petition for rehearing and suggestion for rehearing en banc were denied. Judge Wallace voted to grant both the petition for rehearing

and the suggestion for rehearing en banc. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held in this case that the criminal forfeiture of currency that is transported (or about to be transported) into or out of the United States without the reporting required under 31 U.S.C. 5316 is per se unconstitutional under the Excessive Fines Clause. That holding invalidates a portion of an Act of Congress. It conflicts with the Second Circuit's decision in *United States* v. *United States Currency in the Amount of $145,139*, 18 F.3d 73, cert. denied, 115 S. Ct. 72 (1994). And the decision is incorrect. Under long-standing principles, the forfeiture of instrumentalities of crime, such as goods that are smuggled into or out of the country, is a proportionate, not excessive, "fine." And even if the undeclared currency were not viewed as an instrumentality of the crime in this case, criminal forfeiture is not limited to "instrumentalities." So long as the penalty is not excessive in relation to the criminal conduct, forfeiture, like any other monetary penalty, may constitutionally be imposed. Under that analysis, forfeiting the smuggled currency as a sanction for the felony of willfully failing to report the transportation of the cash is not excessive. For the above reasons and because the court of appeals' decision undermines the enforcement of the nation's currency reporting requirements, review by this Court is warranted.

1. In 18 U.S.C. 982(a)(1), Congress provided that, in imposing sentence for specified offenses, the court "shall order" forfeiture of "any property, real or personal, involved in such offense, or any property traceable to such property." One of the specified statutes is 31 U.S.C. 5316, which provides in relevant part that a person must file a report when that person knowingly "transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1)(A). Money that is not reported in violation of Section 5316 is "involved" in that offense and is therefore subject to mandatory forfeiture under Section 982(a)(1).

The court of appeals acknowledged as much. App., *infra*, 4a. The court ruled, however, that the forfeiture required by Section 982(a)(1) is per se unconstitutional as applied to Section 5316 offenses. The court's sweeping constitutional holding is unambiguous: "Forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316." *Id.* at 8a. In that class of cases, the court believed, "there simply is not an instrumentality relationship between the currency and the crime to satisfy the instrumentality prong of the Excessive Fines test" and "[f]orfeiture of any amount would be unconstitutionally excessive." *Id.* at 8a-9a. As Judge Wallace explained, the Ninth Circuit thereby invalidated on constitutional grounds the portion of Section 982(a)(1) that requires the criminal forfeiture of currency that is not reported in violation of Section 5316. *Id.* at 10a (concurring in the judgment). That invalidation of a significant portion of an Act of Congress warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress").

2. The court of appeals' holding that forfeiture of undeclared currency is per se unconstitutional under the Excessive Fines Clause conflicts with the Second Circuit's decision in *United States Currency in the Amount of $145,139*, *supra*. In that case, the defendant failed to report $145,139 in currency and $150 in travelers checks that he was about to transport, and the district court ordered the entire amount forfeited pursuant to the civil forfeiture provisions of 31 U.S.C. 5317(c).[1] 18 F.3d at 74. Rejecting the contention that forfeiture constituted a second criminal punishment within the meaning of the Double Jeopardy Clause, the Second Circuit held that the money was subject to civil forfeiture as an "instrumentality" of the offense. *Id.* at 75. The court explained that the money "was the 'means' by which the crime was committed. * * * Indeed, it was the very *sine qua non* of the crime." *Ibid.* The court continued:

> Clearly, it is much more accurate to describe the currency as the means by which the crime was committed than it would be to so describe a house from which drugs had been sold or an automobile in which they had been transported. If, as we have held, a house can be considered an instrumentality of the crime, * * * we would be blinking reality if we held that the money in the instant case was any less an instrumentality.

Ibid. (citation omitted). The Second Circuit also rejected the contention that forfeiture of the money

[1] Section 5317(c) provides in relevant part: "If a report required under section 5316 with respect to any monetary instrument is not filed * * *, the instrument * * * may be seized and forfeited to the United States Government."

violated the Excessive Fines Clause, ruling that "it clearly was not excessive." *Id.* at 76. The court noted that "Congress clearly intended that the liability for failure to declare, whether by forfeiture or fine, can be equal to the amount of the monetary instrument involved," and that the "Secretary [of the Treasury] is empowered to remit any portion of the forfeiture or civil penalty that he deems proper." *Ibid.*

The Second Circuit's conclusion that the undeclared currency is an instrumentality of the offense and that the forfeiture of the currency is therefore not an excessive fine cannot be reconciled with the Ninth Circuit's decision here. In the Ninth Circuit, the government is foreclosed from forfeiting smuggled currency, while in the Second Circuit forfeiture of the entire undeclared sum is allowed on an instrumentality theory. That conflict among the circuits warrants resclution by this Court.[2]

3. The court of appeals' decision is incorrect. First, the court erred by concluding that the forfeiture of undeclared currency cannot be justified on an instrumentality theory. Second, even if the un-

[2] The Second Circuit's decision cannot be distinguished on the ground that it involved a civil rather than a criminal forfeiture. The Ninth Circuit applies the same excessive fines test to civil and criminal forfeitures statutes. *United States* v. *$69,292.00 in U.S. Currency*, 62 F.3d 1161, 1166-1168 (1995). The decision in this case therefore precludes civil as well as criminal forfeiture in the Ninth Circuit. Moreover, as discussed, *infra*, if property may be subjected to *civil* forfeiture consistent with the Excessive Fines Clause, generally speaking the same property may be subject to *criminal* forfeiture without violating that Clause. *United States Currency in the Amount of $145,139* therefore necessarily establishes that the criminal forfeiture of unreported currency may constitutionally be ordered in the Second Circuit.

declared cash were not viewed as an instrumentality of the crime, the *criminal* forfeiture of property involved in an offense is still not excessive where, as here, the financial penalty is a proportionate punishment for the nature and gravity of the offense.

a. Since the First Congress, this nation's laws have provided for the forfeiture of goods involved in customs offenses. See, *e.g.*, Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39 (providing that, where goods were unloaded at night or without a permit, "all goods, wares and merchandise, so landed or discharged, shall become forfeited"). Those laws reflect the view that, when property is imported without compliance with declaration and reporting requirements, it is a reasonable remedy to confiscate the property unlawfully imported. In *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam), this Court held, in rejecting a claim under the Double Jeopardy Clause, that the civil forfeiture of such smuggled goods serves legitimate remedial ends. In that case, a defendant who entered the United States without declaring to United States Customs one lot of emerald cut stones and one ring was acquitted of criminal smuggling charges. Following the acquittal, the government instituted a civil forfeiture proceeding against the stones and ring. This Court held that the Double Jeopardy Clause did not bar the forfeiture proceeding, noting that the civil forfeiture served remedial rather than punitive purposes. *Id.* at 235-237. The Court explained that the forfeiture of undeclared property "prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government

for investigation and enforcement expenses." *Id.* at 237. "[S]uch purposes," the Court noted, "characterize remedial rather than punitive sanctions." *Ibid.*

This Court has made clear that the remedial characterization of such customs forfeitures applies equally under the Excessive Fines Clause. In *Austin* v. *United States*, 509 U.S. 602 (1993), the Court held that, while civil *in rem* forfeitures involve a sufficient element of punishment to warrant scrutiny under the Excessive Fines Clause, civil forfeitures that can be justified as remedial are not "excessive" within the meaning of that Clause. *Id.* at 622 n.14; see also *United States* v. *Ursery*, 116 S. Ct. 2135, 2146 (1996). The Court in *Austin* cited *One Lot Emerald Cut Stones* as an example of such a remedial forfeiture, stating that "forfeitures of goods involved in customs violations" are justified as a remedial sanction. *Austin*, 509 U.S. at 621.

The forfeiture of money involved in undeclared currency violations is indistinguishable from the forfeiture of the gems in *One Lot Emerald Cut Stones* and is therefore not constitutionally excessive. Like smuggled gems, undeclared currency is the very item hidden from the government and is therefore the central instrumentality of the offense. Pet. App. 13a (Wallace, J., concurring in the judgment) ("without the currency, there can be no offense"). And here, as in *One Lot Emerald Cut Stones*, forfeiture of the undeclared item is fully justifiable as serving remedial purposes. Forfeiture of undeclared currency, like forfeiture of hidden gems, serves the remedial goal of encouraging persons to report information that enables the government to carry out an important regulatory function. In *One Lot Emerald Cut Stones*, the information determined the gems' exposure to

duties and their admissibility into the United States; in the currency reporting context, the information has "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. 5311; see *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 63 (1974) (reporting requirement singles out transactions found to have the greatest potential for circumventing the enforcement of the laws of the United States). And forfeiture of undeclared currency, like forfeiture of smuggled gems, also "provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses." *One Lot Emerald Cut Stones*, 409 U.S. at 237.

The court of appeals sought to distinguish forfeiture of undeclared currency from forfeiture of smuggled gems on the ground that Section 5316 does not make unlawful "the illegal possession, transportation, or smuggling of dutiable items," but only "the failure to provide information." App., *infra*, 7a-8a; accord *United States* v. *Dean*, 80 F.3d 1535, 1539 n.1, modified, 87 F.3d 1212 (11th Cir. 1996). That description of the offense is incomplete. The offense is not merely the failure to report, but the failure to file a report when "transport[ing] monetary instruments of more than $10,000 at one time * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1)(A). The essence of the offense is therefore smuggling money out of the country, not simply failing to file a report. The Ninth Circuit also found it significant that, in *One Lot Emerald Cut Stones*, the smuggling of goods deprived the government of revenue in the form of duties. App., *infra*, 8a. But this Court did not mention that factor

as a basis for its conclusion that the forfeiture was remedial. 409 U.S. at 237. And the harm to the government from reporting violations, though not directly quantifiable, is considerable. The economic power of much criminal activity depends on money laundering that secretly moves cash into and out of the country. Tracing the flow of currency plays a vital role in attacking global criminal activity. Given the major drain on the economy of such illicit financial activities, crimes that allow unreported dollars to circulate throughout the world inflict significant harm.

In sum, undeclared cash that is brought into or taken out of this country is subject to forfeiture because the money is instrumental to the violation. This Court has made clear that the forfeiture of such smuggled goods fulfills legitimate remedial goals. The remedial character of those forfeitures establishes that they are not excessive fines.

b. Even if the court of appeals were correct in concluding that unreported currency is not an instrumentality of the failure-to-report crime, the court erred in holding that a forfeiture is per se excessive unless the item seized can be characterized as an instrumentality of the offense. Although criminal forfeitures can often be fully justified as a remedial sanction, they need not be. Such forfeitures may also be justified as a punishment. As the Court held in *Alexander* v. *United States*, 509 U.S. 544 (1993), in personam forfeiture is "a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Id.* at 558. Thus, while civil *in rem* forfeiture generally targets contraband, instrumentalities of crime, and proceeds of criminal activity (see *id.* at 563 (Kennedy, J., dissenting);

United States v. *92 Buena Vista Ave.*, 507 U.S. 111, 118-123 (1993) (plurality opinion)), criminal forfeiture may constitutionally include property outside those categories, as long as the value of the property forfeited is not excessive when compared to the nature of the criminal offense. See *Alexander*, 509 U.S. at 559.

In the context of a criminal prohibition that authorizes as punishment a $250,000 fine, a five-year term of imprisonment, or both (see 31U.S.C. 5322(a)), the forfeiture of the very money involved in the failure-to-report offense is not excessively punitive. See *United States* v. *Elder*, 90 F.3d 1110, 1132-1133 (6th Cir.), cert. denied, 117 S. Ct. 529 (1996), 117 S. Ct. 993 (1997); *United States* v. *Milbrand*, 58 F.3d 841, 848 (2d Cir. 1995), cert. denied, 116 S. Ct. 1284 (1996); *United States* v. *Wild*, 47 F.3d 669, 676 (4th Cir.), cert. denied, 116 S. Ct. 128 (1995); *United States* v. *Myers*, 21 F.3d 826, 830 (8th Cir. 1994), cert. denied, 115 S. Ct. 742 (1995). Indeed, such a forfeiture is perfectly calibrated to the seriousness of the offense since the amount of the fine increases in direct proportion to the amount that is concealed.

Nothing in this case suggests that forfeiture of the undeclared cash was an excessive fine. Respondent willfully violated the reporting requirement and then lied about the source of the funds he concealed. For that conduct, he was sentenced to three years' probation and fined $5,000. To add to that sentence a forfeiture of the money he concealed cannot possibly be constitutionally excessive. App., *infra*, 18a. The court of appeals' holding that the criminal forfeiture of even $1 of undeclared currency violates the Excessive Fines Clause is manifestly wrong.

4. The issue in this case has great practical significance to the government's enforcement of the currency reporting laws. By invalidating the statute that provides for forfeiture of undeclared currency, the decision in this case allows currency smuggled into or out of the United States within the jurisdiction of the Ninth Circuit to escape confiscation by the government as a sanction for reporting violations. As a result, the United States is deprived of an effective tool for detecting and deterring illegal activity that involves large amounts of cash. While the lower courts found that the currency in this case had a legitimate source, the court of appeals made no distinction between currency that has a legitimate source and cash that is linked to illegal activity. Currency that represents drug proceeds, international money laundering, or funds involved in tax evasion is particularly likely to be smuggled out of the country in violation of the reporting requirements, yet under the decision below, all such currency may escape seizure as a sanction for non-reporting in those areas included within the Ninth Circuit.

The harmful effects of the Ninth Circuit's decision have already begun to be felt. Statistics gathered by the Treasury Department reflect a sharp and precipitous drop in seizures of unreported currency in the Ninth Circuit in the months following the decision below. The danger of even more serious consequences cannot be discounted. The Ninth Circuit contains major international airports and seaports, has extensive land borders with Mexico and Canada, and includes major international banking centers for persons wishing to conduct transactions in Asia, Central America, and South America. With the gov-

ernment's enforcement authority constrained, that region of the country could readily become a haven for drug dealers, money launderers, and tax evaders intent on conducting non-traceable currency transactions. Because the court of appeals' erroneous holding will have substantial adverse effects on the enforcement of federal currency reporting requirements, review by this Court is particularly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-50094
D.C. No. CR-94-00544-JD (JR)-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

HOSEP KRIKOR BAJAKAJIAN, AKA: JOE BAJAKAJIAN, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

[Filed: May 20, 1996]

OPINION

Before: J. CLIFFORD WALLACE, WARREN J. FERGUSON, and THOMAS G. NELSON, Circuit Judges.

Opinion by Judge FERGUSON; Concurrence by Judge WALLACE.

FERGUSON, Circuit Judge:

The United States appeals the decision of the district court following the defendant's guilty plea to

failure to report currency in violation of 31 U.S.C. § 5316(a)(1)(A).[1] Specifically, the United States appeals the district court's determination that the defendant was required to forfeit only $15,000 of the $357,144 at issue.[2] We affirm the decision of the district court.

I. Factual and Procedural Background

On June 9, 1994, Bajakajian was attempting to board an Alitalia Airways flight leaving Los Angeles, destined for Cyprus. While Bajakajian was waiting to board his flight, U.S. Customs discovered approximately $140,000 concealed in four pieces of Bajakajian's checked luggage and $90,000 concealed in a false bottom of one of his bags. After discovering the hidden currency, a Customs inspector stopped the defendant and his family at the airport and informed them that they were required to report all money in both

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[1] 31 U.S.C. § 5316(a) provides in pertinent part: a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—

(A) from a place in the United States to or through a place outside the United States. . . .

[2] In addition to appealing the district court's decision regarding the amount of currency which Bajakajian should be required to forfeit, the government has also appealed the district court's calculation of Bajakajian's base offense level and the district court's failure to enhance Bajakajian's sentence for obstruction of justice. However, this opinion only addresses the government's appeal of the district court's forfeiture calculation. The remaining issues will be resolved in a separate disposition.

their personal possession and baggage which exceeded $10,000, irrespective of whether the money belonged to them. Bajakajian told the Customs inspector that he had $8,000 with him and that his wife had an additional $7,000. Bajakajian informed the inspector that his family had no additional money to report.

Customs inspectors discovered a total of $357,144 in United States currency in the carry-on baggage, checked-in baggage, wallet, and purse of the defendant and his wife. After being advised of his rights, Bajakajian admitted to Customs agents that he knowingly and wilfully failed to report the currency which was discovered.

On July 8, 1994, a grand jury returned a three count indictment against the defendant. Count One charged the defendant with violation of 31 U.S.C. §§ 5316(a)(1)(A) and 5322(a) for transporting currency of more than $10,000 outside of the United States without filing a report with the United States Customs Service. Count Two charged the defendant with making a false material statement to the United States Customs Service in violation of 18 U.S.C. § 1001. Count Three sought the forfeiture of the $357,144 discovered by Customs under 18 U.S.C. § 982(a)(1).

On October 27, 1994, pursuant to a plea agreement, the defendant entered a guilty plea as to Count One of the indictment and waived a jury trial as to Count Three. The government agreed to dismiss Count Two at the time of sentencing. On December 20, 1994, a bench trial was held for Count Three. The district court found that the entire $357,144 discovered by Customs agents was subject to criminal forfeiture

pursuant to 18 U.S.C. § 982(a)(1). However, at sentencing, the district court ordered the defendant to forfeit only $15,000 of the $357,144. The district court concluded that forfeiture of more than $15,000 would be disproportionate to Bajakajian's culpability, and therefore unconstitutional under the Excessive Fines Clause of the Eighth Amendment. In calculating the amount of forfeiture, the district court recognized that all of the money at issue had come from a lawful source, and was to be used for a lawful purpose.

II. —Discussion

A district court's interpretation of federal forfeiture law is reviewed de novo. *United States v. 1980 Lear Jet*, 38 F.3d 398, 400 (9th Cir. 1994).

The government alleges on appeal that the district court erred in requiring forfeiture of only $15,000 because the entire $357,144 at issue should have been forfeited. In the alternative, the government requests forfeiture of $170,000, the amount of currency which Bajakajian asked a friend to lie about to Customs agents.

The forfeiture statute relevant to this litigation, 18 U.S.C. § 982(a)(1), provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31 . . ., shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property."

Therefore, pursuant to 18 U.S.C. § 982(a)(1), the entire $357,144 at issue in the present case is potentially forfeitable. However, a forfeiture is unconstitutional unless it survives scrutiny under the Excessive Fines Clause of the Eighth Amendment. "The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 2805 (1993) (citation omitted). See also *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 2775-76 (1993) (holding that criminal forfeiture is a form of monetary punishment subject to the Eight Amendment's Excessive Fines Clause); *United States v. Sarbello*, 985 F.2d 716, 717-18 (3d Cir. 1993) (holding that a court may reduce an otherwise mandatory 100% statutory criminal forfeiture on the basis of the Excessive Fines Clause of the Eighth Amendment). Therefore, forfeiture in the present case must be subjected to analysis under the Excessive Fines Clause.

The Supreme Court, in *Austin*, declined to enumerate the factors to be considered in determining whether a forfeiture violates the Excessive Fines Clause. *Austin*, 113 S. Ct. at 2812. We recently addressed this issue and established a two-pronged test for determining whether a forfeiture is unconstitutionally excessive under the Eighth Amendment. *United States v. Real Property Located in El Dorado County*, 59 F.3d 974, 982 (9th Cir. 1995).

Pursuant to this court's Excessive Fines Clause test, a forfeiture is constitutional if: (1) the property forfeited is an "instrumentality" of the crime committed; and (2) the value of the property is proportional to the culpability of the owner.[3] *Id.* at 982.

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[3] The district court bypassed the instrumentality prong of the two part *El Dorado* Excessive Fines test and examined

Therefore, Bajakajian cannot be ordered to forfeit any currency unless forfeiture in the present case would satisfy both the instrumentality and proportionality prongs of our recently established Excessive Fines Clause test.

Application of the instrumentality prong of the Excessive Fines test to a 31 U.S.C. § 5316 violation was recently discussed by this court in *United States v. $69,292 in United States Currency*, 62 F.3d 1161 (9th Cir. 1995). The court questioned whether the currency involved in a § 5316 violation could ever be considered the instrumentality of the crime of failure to report. The court explained that it was not persuaded "that currency lawfully acquired and possessed has that necessarily close relationship to the crime simply because it has not been reported. The crime is the withholding of information, 31 U.S.C. § 5316, not the possession or the transportation of the money." *Id.* at 1167. The court further explained that the money at issue in a § 5316 violation is not contraband, and the money is presumed under the statutory scheme to be lawfully acquired and possessed. The statute does not impose a limit on the amount of U.S. currency which may be exported to foreign jurisdictions. Persons leaving the United States are free, as they have always been, to take with them such amounts of cash as they so choose. *Id.*

This court, in *$69,292*, also rejected the argument that the currency in a § 5316 violation satisfies the instrumentality requirement based upon the notion

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only the proportionality of forfeiture in the present case. This is probably due to the fact that the Ninth Circuit's decision in *El Dorado* was handed down subsequent to the district court's decision.

that the currency's existence was a precondition to the reporting requirement of 31 U.S.C. § 5316.

> Simply put the existence of the currency as a precondition does not make it an instrumentality. For example, we would not characterize lawfully earned income an instrumentality forfeitable as such simply because a taxpayer wilfully failed to report that income on his tax return in violation of the tax code. The government would have us stretch the fiction of an "instrumentality" to the breaking point.

Id. at 1167-68 (citation omitted). See also *Austin v. United States*, 113 S. Ct. 2801, 2811 (1993) (rejecting expansive definitions as to what qualifies as the instrumentality of a particular crime).

The government argues that the majority opinion in *$69,292* conflicts with the Supreme Court's decision in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972). There, the Court upheld the forfeiture of imported goods pursuant to 19 U.S.C. § 1497,[4] where the defendant failed to declare one lot of emerald cut stones and a ring upon his entry into the United States. *Id.* at 233.

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[4] 19 U.S.C. § 1497 has since been amended, but at the time of *One Lot Emerald Cut Stones*, it provided:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

However, *$69,292* and *One Lot Emerald Cut Stones* are not in conflict. *One Lot Emerald Cut Stones* involved the smuggling of contraband. When a defendant is convicted for failure to report currency pursuant to 31 U.S.C. § 5316, the crime is not the illegal possession, transportation, or smuggling of dutiable items. Rather, the crime is merely the failure to provide information. Money in lawful possession, as it was here, is not contraband. Moreover, the currency at issue in a § 5316 violation is not contraband, is presumed to be lawfully possessed and is not subject to duty. It is not illegal to take currency out of the country. The key difference is that a violation of § 5316 merely deprives the government of information, whereas the smuggling of goods across the border deprives the government of revenue. *$69,292*, 62 F.3d at 1167. Therefore, there is a much tighter instrumentality connection between property sought to be forfeited and the crime when the crime committed is the failure to pay a duty.[5]

We hereby adopt the logic of the court in *$69,292*.[6] Forfeiture of currency is unconstitutional when the

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[5] Such a distinction is not new. *See Austin v. United States*, 113 S. Ct. 2801, 2811-12 (1993) (The Supreme Court distinguished cases involving drug forfeitures from cases involving customs violations.).

[6] The government alleges that the reasoning of the majority in *$69,292* with respect to the Excessive Fines Clause and 31 U.S.C. § 5316 is dicta because the district court might not have needed to address this issue on remand. However, this portion of *$69,292* is not dicta. "[D]irection to the district on how to proceed continues to be binding precedent, even if characterized as an alternative holding." *Operating Eng'rs Pension Trust v. Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301, 1304 (9th Cir.) (explaining that it was not dicta for the Ninth

crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316. In such situations, there simply is not an instrumentality relationship between the currency and the crime to satisfy the instrumentality prong of the Excessive Fines test.[7]

Therefore, the district court erred in ordering Bajakajian to forfeit $15,000. Forfeiture of any amount would be unconstitutionally excessive under the *El Dorado* Excessive Fines Clause test. However, Bajakajian failed to file a cross-appeal requesting a modification of the district court's order that he forfeit $15,000. If an appellee seeks a modification of the district court's judgment, he must file a cross-appeal requesting the modification. Unless an appellee files a cross-appeal, "the appellee may not

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Circuit in *Sapper v. Lenco Blade, Inc.*, 704 F.2d 1069 (9th Cir. 1983) to direct the district court on how to resolve an issue on remand which might only arise, depending upon the resolution of another issue), *modified*, 778 F.2d 538 (9th Cir. 1985).

[7] The government argues that *United States v. One 1985 Mercedes-Benz*, 14 F.3d 465 (9th Cir. 1994) provides support for forfeiture in the present case. In *One 1985 Mercedes-Benz*, the court held that vehicles used to export currency in violation of 31 U.S.C. § 5316 are subject to forfeiture under 18 U.S.C. § 982. However, *One 1985 Mercedes-Benz* does not provide support for forfeiture in the present case for two reasons. First, a car used to transport money is clearly the instrumentality of a § 5316 violation because the car itself is used to export and conceal the currency. Second, *One 1985 Mercedes-Benz* was decided prior to both *El Dorado*, which established the two-pronged Excessive Fines test, and *$69,292*, which applied the *El Dorado* test for the first time to a § 5316 violation. Therefore, the facts of *One 1985 Mercedes-Benz* are not analogous to the facts of the present case, and its logic is questionable due to the recent decisions handed down by this court in *El Dorado* and *$69,292*.

attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *United States v. One 1964 MG*, 584 F.2d 889, 890 (9th Cir. 1978) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

Although pursuant to the Excessive Fines Clause Bajakajian cannot be ordered to forfeit any of the unreported currency, he is nonetheless forced to accept the decision of the district court. Bajakajian failed to file a cross-appeal, and therefore, this court lacks jurisdiction to set aside the district court's forfeiture order of $15,000.

III. Conclusion

The decision of the district court is AFFIRMED.

WALLACE, Circuit Judge, concurring:

The majority takes our dicta in *United States v. $69,292.00 in U.S. Currency*, 62 F.3d 1161 (9th Cir. 1995) (*$69,292*), to an illogical extreme. In so doing, the majority strikes down a portion of 18 U.S.C. § 982(a)(1), thereby unduly limiting the government's forfeiture powers. I agree only with the majority's ultimate decision to affirm the $15,000 forfeiture. Because I would do so for entirely different reasons, I concur in result only.

We are not bound by the dicta in *$69,292*. In *$69,292*, we explained the analysis used to determine whether a forfeiture violates the Eighth Amendment. *$69,292*, 62 F.3d at 1166-67, *citing United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995) (*El Dorado*). To satisfy the Eighth Amendment's prohibition against excessive fines, forfeited property must be instrumental to the crime and proportional in value to the culpability of the owner. *El Dorado*, 59 F.3d at 982. In *$69,292*, the district court did not analyze the forfeiture in terms of our intervening decision in *El Dorado*. Thus, we remanded to enable the district court to make appropriate findings. *$69,292*, 62 F.3d at 1168.

The majority would read *$69,292* as holding that currency involved in a section 5316 violation is never an instrumentality of the crime. Majority at 337 & n.6. The majority's reading of *$69,292* renders all forfeitures of currency in such circumstances unconstitutional under our test in *El Dorado*. But if in *$69,292* we had held that all forfeitures of currency involved in reporting violations necessarily fail *El Dorado*, we would not have written that, "[w]e make no assessment as to whether the forfeiture meets the *El Dorado* test." *$69,292*, 62 F.3d at 1168. As Judge Rymer accurately wrote in dissent, *$69,292*'s instrumentality discussion is dicta. *Id.* at 1168 (Rymer, J., dissenting).

Not only is this *$69,292* discussion clearly dicta, but there are two additional interrelated problems—one with the majority's interpretation of the dicta in *$69,292* and one with the *$69,292* dicta itself.

First, the majority misreads our remarks in *$69,292*. We asserted there that we were not "persuaded that currency *lawfully acquired and possessed* has the necessarily close relationship to the crime simply because it has not been reported." *Id.* at 1167 (emphasis added). Our remarks were focused on the source of the defendants' funds, and we suggested that legally obtained funds might not be instrumental.

See id. (explaining that "the reporting requirement applies to all currency, whether it is lawfully gained or not," and suggesting that we should analyze forfeiture based in part on the source of the funds). If on remand the district court in *$69,292* had found that the defendants acquired the funds illegally, nothing in *$69,292* would have precluded forfeiture.

The majority, purporting to "adopt the logic of the court in *$69,292*," maj. op. at 337, overlooks *$69,292*'s underlying rationale. The majority holds that "[f]orfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316." *Id.* Thus, even if a district court finds that money was illegally acquired, the majority does not allow forfeiture. Or, even if a defendant's failure to report is combined with another violation of United States law (and the other law does not independently allow forfeiture), the majority would still not allow forfeiture. Nothing in *$69,292*'s dicta supports this result.

Second, it is precisely *$69,292*'s focus on lawfully acquired funds that makes *$69,292*'s instrumentality dicta problematic. *$69,292* suggests that instrumentality should turn, at least in part, on the source of the funds. However, I interpret the instrumentality inquiry as being completely divorced from the source of the funds. After all, why is currency any more instrumental when the currency is legally obtained as opposed to when it is illegally obtained? *See United States v. $145,139.00*, 18 F.3d 73, 75 (2d Cir.) (Currency was "an instrument of the crime [of failure to report]. It was the 'means' by which the crime was committed. . . . Indeed, it was the very *sine qua non* of the crime."), *cert. denied*, 115 S. Ct.

72 (1994); *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring) (explaining the instrumentality inquiry as being whether "property has been 'tainted' by unlawful use . . . [in other words,] whether the confiscated property has a close enough relationship to the offense" (emphasis omitted)), *quoted in El Dorado*, 59 F.3d at 982. In this case, the crime was Bajakajian's failure to report $357,144 that he had secretly stashed. I cannot agree with the majority that there is an insufficient nexus between the acquired currency and the offense—without the currency, there can be no offense.

Of course, the source of the acquired funds *does* have a place in our Eighth Amendment inquiry under *El Dorado*. However, the inquiry into the source of the funds is part of the *proportionality* analysis, not the instrumentality inquiry. *El Dorado*, 59 F.3d at 985-86 (explicitly requiring district court to consider, as part of proportionality determination, the "culpability of the owner"); *see also id.* at 983 (adopting "the proportionality test as a check on the instrumentality approach" because of the instrumentality prong's "potentially harsh results, when applied alone"). If, as the district court held, Bajakajian's funds were lawfully obtained from friends and family and were not to be illegally used, then these facts might warrant a reduced forfeiture to avoid an excessive fine.

I therefore disagree with the majority's conclusion that the currency was not instrumental as a matter of law. I would hold that the district court properly found that the entire amount of currency was potentially forfeitable. The currency was instrumental. As to proportionality, I would review for clear error

the district court's factual findings underpinning its decision to forfeit only $15,000. *See United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 (9th Cir. 1996) (findings of fact underlying forfeiture reviewed for clear error). The district court found that the funds were lawfully acquired and were to be lawfully used. The district court next found that forfeiture of only $15,000 was proportional to Bajakajian's culpability. I do not believe that the district court's findings were clearly erroneous; therefore, I would affirm the $15,000 forfeiture.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-50094

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

HOSEP KRIKOR BAJAKAJIAN, AKA: JOE BAJAKAJIAN
DEFENDANT-APPELLEE

[Filed: Nov. 18, 1996]

ORDER

Before: WALLACE, FERGUSON, and T. G. NELSON, Circuit Judges.

Judge Ferguson and Judge T. G. Nelson have voted to deny the petition for rehearing. Judge Wallace has voted to grant the petition for rehearing. Judge T. G. Nelson has voted to reject the suggestion for rearing en banc, Judge Ferguson has recommended rejection of the suggestion for rehearing en banc. Judge Wallace has vote to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR-94-544-JGD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HOSEP BRIKOR BAJAKAJIAN, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, January 19, 1995

* * * * *

[51] THE COURT: Well, the finding is expressed as follows:

"That the Government"—

"That the United States has established beyond a reasonable doubt two elements. One, [52] that on June 9th, the defendant was about to transport the funds in the—in United States currency outside the U.S., which was a violation of 31 U.S.C. 5316."

"And two, that the funds were involved in the offense. Or as the finding itself says that the—that $357,144 in United States currency was involved in the offense. The Court, therefore, finds that the Government has established criminal forfeiture pursuant to 18 U.S.C. 982(a)(1). The actual amount to be forfeited, taking into account Eighth

Amendment consideration shall be determined by the Court."

* * * * *

[61] THE COURT: All right. I thank you.

Well, the Court must make findings on the forfeiture issue, and some of those findings have already been stated and the record will reflect them.

I do believe that the United States currency was in the suitcase and in the carry-on luggage for reasons that were not illegal. I do believe that, even though it's a somewhat suspicious and confused story, documented in the [62] poorest way, and replete with past misrepresentation, that the funds were—the funds of the defendant, and borrowed funds.

I do believe that the elements of 2(s)1.3(b)2 have been established. That the funds were the proceeds of a lawful activity, and that they were to be used for a lawful purpose; to wit, to pay some lawful obligation to two relatives in Europe.

That the base offense level is 15. That the 2(s)1.3(b)2 requires a six-level reduction. I accept the probation officer's calculation in that respect, which results in an adjusted offense level of 9. And that the defendant is entitled to a two-level adjustment downwards for acceptance of responsibility, resulting in a total offense level of 7. The criminal history category is 1. And the defendant is—and thus this case falls within zone A, that probation is appropriate. Probation is recommended by the probation officer prosecute.

And I think that a fine is appropriate. And the maximum fine under the guidelines pursuant to 5(e)1.2 is $5,000. Because I believe U.S. versus Buscher 18 F.2d 1407, a 1987 case, requires that, even

though that, as I remember the forfeiture in that case was not pursuant to 982 18 U.S.C. 982 A.1, as it is in this case, it was pursuant to another section. That requires the Court to do [63] what the Court wishes not to do and that is to engage in the Eighth Amendment exercise, and determine what a reasonable amount for forfeiture is.

First of all, there is little doubt that forfeiting the entire amount would certainly be extraordinarily harsh, and would violate the Eighth Amendment. And I would not under the circumstances attain—order the forfeiture of the entire 357,000 plus dollars. That would be grossly disproportionate to the offense in question. The offense, after all, was an important, but nevertheless minor offense, the failure to disclose.

And I think the evidence has developed that the defendant's state of mind at the time was—at the time he committed the offense, that is, the failure to report, I think grew out of the—out of what we talked about, out of distrust for the Government. I see no sin in recognizing these cultural differences. So, the amount of forfeiture will be modest, and will be very very minor, because in truth, and, in fact, I think none should be forfeited. But it will make up for what I think a reasonable fine should be.

I think $5,000, the guideline maximum is too little. And I think the Government has gone to great lengths here, and expended its resources in this case, so, the amount, for forfeiture amount will be $15,000, for a total outlay by the defendant of $20,000.

There will be no incarceration, absolutely no reason to incarcerate this gentlemen, but there will be a period of probation with conditions attached, rather standard conditions attached.

* * * * *